Abdul Ghani Haroon v Ketua Polis Negara and another application

HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATIONS NO 44–9 OF 2001 AND NO 44–10 OF 2001
MOHD HISHAMUDIN J
30 MAY 2001

Preventive Detention *— Detention order — Application for habeas corpus — Right to apply for habeas corpus a constitutional right — Federal Constitution art 5(2)*

Preventive Detention *— Detention order — Every detention prima facie unlawful — Burden on detainer to justify detention — Whether detention unlawful on the facts*

Abdul Ghani bin Haroon and Gobalakrishnan a/l Nagappan ('the applicants') were separately arrested under s 73(1) of the Internal Security Act 1960 ('the ISA'). The detention of the applicants was extended twice subsequent to their arrests. The police denied family members, lawyers and members of the SUHAKAM ('Human Rights Commission of Malaysia') access to the applicants. Abdul Ghani's wife and Gobalakrishnan's brother respectively applied for the issue of a writ of habeas corpus. The respondent in both applications was the Inspector General of Police. Both applications were heard together by consent. On a preliminary issue, the High Court ruled that both applicants had the right to be present in court at the hearing of the applications. However, the Federal Court on application by the respondent, stayed this ruling of the High Court. On the merits, the High Court had to consider whether the applicants were unlawfully detained.

Held, deciding that the detention of both applicants was unlawful and ordering that the applicants be produced before the court to be released:

(1) By virtue of art 5(2) of the Federal Constitution ('the Constitution'), the right to apply to the High Court for a writ of habeas corpus is not merely a legal right but also a constitutional right available to any person who believes that he has been unlawfully detained (see p 696B).

(2) The cardinal principal is that every detention is prima facie unlawful and the burden of proof is on the detainer to justify it. On the facts, the detention of both applicants was unlawful for the following reasons:

(a) The arresting officers failed to justify the arrests in that their affidavits were vague in nature and did not sufficiently show that there had been due compliance with the requirements of s 73(1) read with s 8 of the ISA. An arresting officer must clearly state the grounds of detention in his affidavit. An arresting officer cannot merely reproduce the words of s 73(1)(a) as was done in the instant case. He must show in his affidavit that he has directed his mind to the requirements

of s 8. Since the word 'and' and not 'or' appears at the end of limb (a) to s 73(1), limb (b) to s 73(1) should therefore be read conjunctively with limb (a) and not disjunctively. In compliance with limb (b) to s 73(1), the arresting officer's affidavit must provide sufficient particulars. The arresting officer must furnish in his affidavit, not necessarily detailed particulars but some reasonable amount of particulars not only for the purpose of satisfying the court that he has some basis for the arrest but also to enable the detainee to defend himself (see pp 698E, 699B–C, 699F, 699H–700A); *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293 distinguished.

(b) The affidavits of the arresting officers did not sufficiently show that there had been compliance with art 5(3) of the Constitution. The ISA does not exempt arresting officers from informing applicants of their grounds of arrest. On the facts the omission was a breach of art 5(3) of the Constitution and the breach rendered the arrest and detention unlawful (see pp 700D–E, 700I).

(c) The further detention of the applicants was unlawful due to improper compliance with paras (a) and (b) of the proviso to s 73(3). The affidavits of the authorizing officers did not say anything about the purpose of the extension of the detention. The affidavits also failed to state the reasons for authorizing the further detention. Although s 73(3) of the ISA empowers the police to detain a detainee up to a period of 60 days, this period of 60 days is the maximum period permissible. The police do not have the absolute power to detain a person for 60 days. The power to authorize further detention under paras (a), (b) and (c) of the proviso to s 73(3) must be exercised reasonably and fairly and is subject to review by the court in a habeas corpus proceeding (see pp 701C, 702C, 702E–F, 702H).

(d) The detention was mala fide by reason of the fact that the Inspector General and the director of Special Branch had prematurely made up their minds to detain the two applicants for up to a period in excess of the permissible 30 days. This was clearly shown by the joint letter of the Inspector General and director of Special Branch (see p 703C).

(e) The detention was also mala fide by reason of deliberate and unreasonable denial of access to family members. The family members had been denied access to the applicants for almost 40 days despite a formal request having been made to the Inspector General of Police. To deny the applicants and their families access to one another for such a long period is cruel, inhuman and oppressive not only to the applicants but to their families as well (see pp 703H, 704B).

(f) The detention was also mala fide by reason of deliberate and unreasonable denial of access to lawyers by the respondent. Such a denial was not only cruel, inhuman and oppressive but it was also a blatant violation of the applicants' constitutional right under art 5(3) of the Constitution. The denial of access to lawyers was not only a gross violation of the fundamental rights as enshrined in the Constitution but also greatly prejudiced the applicants in the present applications (see pp 704F, 706B).

Obiter:

It is perhaps time for Parliament to consider whether the ISA which was originally meant to counter communist terrorism in the early years of independence, is really relevant to the present day situation. If at all it is to be retained, its provisions may need to be thoroughly reviewed to prevent or minimize the abuses highlighted in this judgment (see p 707B).

[**Bahasa Malaysia summary**

Abdul Ghani bin Haroon dan Gobalakrishnan a/l Nagappan ('kedua-dua pemohon tersebut') telah secara berasingan ditangkap di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960 ('AKDN tersebut'). Penahanan pemohon-pemohon tersebut telah dilanjutkan dua kali berikutan tangkapan mereka. Polis telah menafikan mereka berjumpa dengan ahli keluarga, peguam dan ahli SUHAKAM (Suruhajaya Komisen Hak Kemanusiaan Malaysia'). Isteri Abdul Ghani dan abang Gobalakrishnan masing-masing telah memohon terhadap isu writ habeas corpus. Responden di dalam kedua-dua permohonan adalah Ketua Polis Negara. Kedua-dua permohonan tersebut didengar bersama dengan kebenaran. Berdasarkan isu awalan, Mahkamah Tinggi memerintahkan bahawa kedua-dua pemohon tersebut mempunyai hak untuk hadir di mahkamah pada masa perbicaraan permohonan-permohonan tersebut. Namun begitu, Mahkamah Persekutuan atas permohonan responden, telah menggantungkan keputusan Mahkamah Tinggi ini. Berdasarkan merit-merit, Mahkamah Tinggi perlu mempertimbangkan sama ada pemohon-pemohon tersebut telah di tahan secara tidah sah.

Diputuskan, memutuskan bahawa penahanan kedua-dua pemohon tersebut adalah tidak sah dan memerintahkan bahawa kedua-dua pemohon tersebut dihadapkan ke mahkamah untuk dibebaskan:

(1) Menurut perkara 5(2) Perlembagaan Persekutuan (Perlembagaan tersebut'), hak-hak untuk memohon kepada Mahkamah Tinggi untuk satu writ habeas corpus bukan hanya satu hak di sisi undang-undang tetapi juga satu hak perlembagaan kepada mana-mana orang yang mempercayai bahawa beliau telah ditahan secara tidak sah (lihat ms 696B).

(2) Prinsip penting adalah di mana setiap penahanan adalah prima facie tidak sah dan beban bukti adalah atas pemohon-pemohon tersebut untuk menjustifikasikannya. Berdasarkan fakta-fakta, penahanan kedua-dua pemohon tersebut adalah tidak sah kerana sebab-sebab berikut:

(a) Pegawai-pegawai yang membuat tahanan telah gagal untuk menjustifikasikan tangkapan-tangkapan tersebut di mana afidavit-afidavit mereka bersifat kabur dan tidak cukup untuk menunjukkan bahawa terdapat pematuhan dengan keperluan-keperluan s 73(1) dibaca bersama dengan s 8 AKDN tersebut. Seorang pegawai yang membuat tahanan mestilah dengan jelas menyatakan alasan-alasan penahanan di dalam afidavit beliau. Seorang pegawai yang membuat tahanan bukan hanya mengemukakan semula perkataan-perkataan s 73(1)(a) sebagaimana yang telah dibuat di dalam kes ini. Beliau mesti menunjukkan di dalam afidavit beliau bahawa beliau telah menghalakan fikiran beliau kepada keperluan-keperluan s 8. Memandangkan perkataan 'dan' dan bukan 'atau' timbul di hujung cabang (a) kepada s 73(1), cabang (b) kepada s 73(1) hendaklah oleh demikian dibaca bersama dengan cabang (a) dan bukan berasingan. Dengan pematuhan cabang (b) kepada s 73(1), afidavit pegawai yang membuat tahanan mesti mengemukakan butir-butir yang mencukupi. Pegawai yang membuat tahanan tersebut mesti memasukkan dalam afidavit beliau, tidak semestinya butir-butir terperinci tetapi sejumlah yang munasabah butiran tersebut bukan hanya bagi tujuan memuaskan mahkamah bahawa beliau mempunyai asas untuk tangkapan tersebut tetapi juga untuk membolehkan pemohon-pemohon tersebut membela diri sendiri (lihat ms 698E, 699B–C, 699F, 699H–700A); *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293 dibeza.

(b) Afidavit-afidavit pegawai-pegawai yang membuat tahanan tersebut tidak menunjukkan dengan cukup bahawa terdapat pematuhan dengan perkara 5(3) Perlembagaan tersebut. AKDN tersebut tidak mengecualikan pegawai-pegawai yang membuat tahanan daripada memaklumkan pemohon-pemohon tentang alasan-alasan penangkapan mereka. Berdasarkan fakta-fakta peninggalan tersebut adalah satu pelanggaran perkara 5(3) Perlembagaan tersebut dan pelanggaran tersebut menyebabkan penangkapan dan penahanan tersebut tidak sah (lihat ms 700D–E, 700I).

(c) Penahanan lanjutan kedua-dua pemohon tersebut adalah tidak sah kerana pematuhan yang tidak betul dengan perenggan-peranggan (a) dan (b) kepada proviso s 73(3). Afidavit-afidavit yang memberi kuasa kepada pegawai-pegawai tersebut tidak langsung mengatakan apa-apa tentang tujuan lanjutan penahanan tersebut. Afidavit-afidavit

tersebut juga gagal untuk manyatakan sebab-sebab memberian kuasa terhadap penahanan lanjutan tersebut. Walaupun s 73(3) AKDN tersebut memberikan kuasa kepada polis untuk menahan seorang yang ditahan sehingga satu tempoh 60 hari, tempoh 60 hari ini adalah tempoh maksimum yang dibenarkan. Polis tidak mempunyai kuasa mutlak untuk menahan seseorang selama 60 hari. Kuasa untuk membenarkan penahanan lanjutan di bawah perenggan-perenggan (a), (b) dan (c) kepada proviso s 73(3) mesti digunakan dengan munasabah dan adil dan tertakluk untuk kajian semula oleh mahkamah dalam satu prosiding habeas corpus (lihat ms 701C, 702C, 702E–F, 702H).

(d) Penahanan tersebut adalah mala fide oleh sebab fakta bahawa Ketua Polis Negara dan pengarah Cawangan Khas telah secara pramasa memutuskan fikiran mereka untuk menahan kedua-dua pemohon tersebut sehingga satu tempoh yang melebihi 30 hari yang dibenarkan. Ini dengan jelas ditunjukkan oleh satu surat bersama Ketua Polis Negara dan pengarah Cawangan Khas tersebut (lihat ms 703C).

(e) Penahanan tersebut adalah juga mala fide oleh sebab penafian yang sengaja dan tidak munasabah untuk berjumpa dengan ahli keluarga. Ahli keluarga telah dinafikan untuk berjumpa dengan kedua-dua pemohon tersebut untuk lebih 40 hari walaupun satu permintaan rasmi telah dibuat kepada Ketua Polis Negara. Untuk menafikan kedua-dua pemohon tersebut dan keluarga mereka untuk berjumpa satu sama lain bagi tempoh yang lama adalah kejam, tidak berperikemanusiaan dan menindas bukan sahaja kepada kedua-dua pemohon tersebut tetapi juga kepada keluarga mereka (lihat ms 703H, 704B).

(f) Penahanan tersebut adalah juga mala fide oleh sebab penafian yang sengaja dan tidak munasabah untuk melantik peguam oleh responden. Penafian sedemikian bukan sahaja kejam, tidak berperikemanusiaan dan menindas tetapi juga satu pencabulan yang terang-terangan terhadap hak perlembagaan kedua-dua pemohon tersebut di bawah perkara 5(3) Perlembagaan tersebut. Penafian untuk berjumpa peguam bukan sahaja satu pencabulan yang melampau tentang hak asasi sebagaimana yang terkandung dalam Perlembagaan tersebut tetapi juga amat memprejudiskan kedua-dua pemohon tersebut di dalam permohonan-permohonan sekarang ini (lihat ms 704F, 706B).

Obiter:

Mungkin telah tiba masa untuk Parlimen mempertimbangkan sama ada AKDN tersebut yang pada asalnya bertujuan untuk bertindak balas terhadap serangan komunis pada tahun-tahun awal

kemerdekaan, adalah relevan dengan situasi hari ini. Sekiranya ia perlu dikekalkan, peruntukan-peruntukannya mungkin patut dikaji semula untuk menghalang atau mengurangkan penyalahgunaan-penyalahgunaan sebagaimana yang ditekankan di dalan penghakiman ini (lihat ms 707B).] A

B

Notes

For cases on detention order generally, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1195–1327.

Cases referred to C

Associated Press v National Labor Relations Board [1937] 301 US 103 (refd)

Bohar Singh Khera v Secretary of State for the Home Department and another appeal [1983] 2 WLR 321 (refd)

Hashim bin Saud v Yahaya bin Hashim & Anor [1977] 2 MLJ 116 (refd) D

Liversidge v Sir John Anderson & Anor [1942] AC 206 (refd)

Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 (refd)

Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 293 (distd) E

Legislation referred to

Criminal Procedure Code s 365
Courts of Judicature Act 1964 s 25, para I of the Schedule
Federal Constitution arts 5(2), (3) F
Human Rights Commission of Malaysia Act 1999 s 4(2)(d)
Internal Security Act 1960 ss 8, (1), 73(1), (3)(a), (3)(b), (3)(c)

R Sivarasa (*Kamarul Hisham, Kandasamy Palaniandy, Saiful Izham, M Moganambal and Hamidzun Khairuddin* with him) (*Selvam Shanmugam & Partners*) for the applicants. G

Abdul Wahab bin Mohd (*Abdul Rashid Sidin* with him) (Attorney General's Chambers) for the respondent.

Mohd Hishamuddin J:. Encik Abdul Ghani bin Haroon and En Gobalakrishnan a/l Nagappan ('the applicants') are members of the political party Parti Keadilan Nasional. They had been separately arrested under s 73(1) of the Internal Security Act 1960 ('the ISA'). En Gobalakrishnan was arrested at 11.50pm on 10 April 2001 at Kuah Police Station, Langkawi, whilst En Abdul Ghani was arrested at 10.25am on 11 April 2001 at Kuching International Airport. H

Since his arrest, the detention of En Gobalakrishnan has been extended twice. First, it was extended on 11 April 2001 by the authority of Inspector Wong Lang Eng of Police Headquarters, Bukit Aman, for a period of 24 hours. Subsequently it was extended on 12 April 2001 by the authority I

of ASP Cheah Kee Sam of Police Headquarters, Bukit Aman, for a further period of 28 days.

Since his arrest, the detention of En Ghani has been extended twice. First it was extended on 12 April 2001 by the authority of Chief Inspector Eugene Tay of Police Headquarters, Kuching, for a period of 24 hours. Subsequently, it was extended on 13 April 2001 by the authority of ASP Cheah Kee Sam of Police Headquarters, Bukit Aman, for a further period of 28 days.

Right until the last day of the hearing of this application (Tuesday, 22 May 2001) the family members and the lawyers engaged by their respective families have been denied access by the police department; and so was the Human Rights Commission ('SUHAKAM'), notwithstanding the clear provisions of the Human Rights Commission of Malaysia Act 1999, in particular, s 4(2)(d).

The families, on behalf of the two applicants, have separately applied to this court for a writ of habeas corpus, through Criminal Application 44–9–2001 and Criminal Application 44–10–2001. The supporting affidavit of En Ghani was deposed by his wife Puan Roslijah bte S Syed, whilst the supporting affidavit for En Gobalakrishnan's application was deposed by his brother, En Deven a/l Nagappan. By consent, these two applications have been consolidated and are being heard together.

The common respondent in the applications is the Inspector General of Police.

The affidavits in both the cases before me are more or less similar in contents. So for the sake of convenience, to a large extent in this judgment, I will be relying on the affidavits in the case file of En Ghani (44–9–2001) but whatever findings, rulings, criticisms or views that I make will apply equally to the case of En Gobalakrishnan.

Apart from applying to the court for their freedom, En R Sivarasa, on behalf of the two applicants, also applied to the court to direct the respondent to grant the applicants their constitutional right of access to counsel.

Now, throughout the whole proceedings of this application, both the applicants were not present in court. This requires some explanation. A few days before the commencement of the hearing on 23 April 2001, the deputy registrar of this court had caused to be issued and served on the respondent a 'notice to produce' so that the applicants could be present at the hearing of their applications. This is the normal practice of this court in all habeas corpus proceedings. But the respondent failed to comply with the order. The respondent had no intention to disobey the court's order. The position taken by the respondent was that, in law, the applicants have no right to be present at the hearing of their applications.

Thus, there was a preliminary issue before this court: in law do the applicants have the right to be present at the hearing of their applications? Encik Sivarasa for the applicants insisted that they have the right to be present. The learned Senior Federal Counsels, En Abdul Wahab and

En Abdul Rashid Sudin, on the other hand, submitted that they have no right.

After hearing arguments from both sides for several days, I had reserved my decision to Friday, 4 May; and that decision was delivered on the appointed day. In my decision I ruled that, by virtue of cl (2) of art 5 of the Federal Constitution ('the Constitution'), the right to apply to the High Court for a writ of habeas corpus was not merely a legal right, but also a constitutional right available to any person who believes that he has been unlawfully detained. Since the right is a constitutional right, he has every right to be present in court at the hearing of his application. In other words, the right to be present is a constitutional right implicit in cl(2) of art 5 of the Consttution.

Accordingly, I ordered that the two applicants be produced before me on the morning of 8 May. However, in the morning of that day, before the applicants could be produced, on the application of the respondent, my ruling that both the applicants have the right to be present in court during the hearing of their application was stayed by Federal Court judge, YA Dato' Abdul Malek bin Ahmad. On 16 May, a bench of the Federal Court reversed my ruling.

I respect and am bound by the ruling of the Federal Court.

Next, I shall say a few words on habeas corpus. The writ of habeas corpus has its origins in English law. It is the most famous writ in English law. It is called the great writ of liberty. The origin and history of the writ are lost in antiquity, but it takes its name from the two mandatory Latin words 'habeas' and 'corpus'. There is, however, ample evidence that it was in use before the days of the Magna Carta. Although habeas corpus is a writ of great antiquity, it did not attain its modern form as a mechanism for securing the liberty of a subject until the 17th century, when its application was one of the aspects of the constitutional struggle between the English King and his Parliament.

The great English judge, Lord Denning, in his first Hamlyn Lectures called *Personal Freedom* spoke of the writ of habeas corpus. This is what he said:

> The law says that no man is to be imprisoned except by judgment of the King's Courts or whilst awaiting trial by them. This freedom is safeguarded by the famous writ in England, the writ of habeas corpus. Whenever any man in England is detained against his will, not by sentence of the King's Courts, but by anyone else, then he or anyone on his behalf is entitled to apply to any of the judges of the High Court to determine whether his detention is lawful or not. The court will then, by this writ, command the gaoler or whoever is detaining him, to bring him before the court; and, unless the detention is shown to be lawful, the court will at once set him free.
>
> This was not always so. In 1627, when the executive government cast Sir Thomas Darnel and four other knights into prison because they would not subscribe money for the King, the Court of King's Bench, to its disgrace, held that if a man were committed by command of the King he was not to be delivered by habeas corpus. Those were the evil days when the judges took their orders from the executive. But the people of England overthrew the

A government which so assailed their liberties, and passed statutes which gave the writ its present power. Never hereafter have the judges taken their orders from anyone.

The relevant laws governing the writ of habeas corpus are, firstly art 5(2) of the Constitution which provides:

B Liberty of the person

5(1) …

(2) Where complaint is made to a High Court or any judge thereof that person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

C

The above constitutional guarantee must be read together with s 365 of the Criminal Procedure Code (Act 593), s 25 of the Courts of Judicature Act 1964 and para I of the Schedule of the same Act.

By virtue of cl (2) of art 5 of the Constitution, the right to apply to the
D High Court for a writ of habeas corpus is not merely a legal right but also a constitutional right available to any person who believes that he has been unlawfully detained.

Judges are the protectors of fundamental liberties of the subjects as enshrined in the Constitution. It is a sacred trust that they must vigilantly uphold. In this connection, I am reminded of what has been said by Lord
E Atkin in his dissenting judgment in *Liversidge v Sir John Anderson & Anor* [1942] AC 206 at p 244:

> I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. ... In this
F country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

G And there is also the warning of Sutherland J in his dissenting judgment in *Associated Press v National Labor Relations Board* [1937] 301 US 103 at p 141 to the effect:

> ... the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while
H yet there was time.

Now, the cardinal principle is that every detention is prima facie unlawful and the burden of proof is on the detainer to justify it *Bohar Singh Khera v Secretary of State for the Home Department and another appeal* [1983] 2 WLR 321).

I In the present case, it is my judgment that the detention of the two applicants by the police is unlawful.

I hold so for the following grounds.

Non-compliance with s 73(1) of the ISA

Firstly, the arresting officers failed to justify the arrest. In law, the arresting officers can only justify the arrest by showing the court that the arrest was carried out strictly in accordance with s 73(1) of the ISA, read with s 8 of the same Act. Section 73(1) reads:

> Power to detain suspected persons
>
> 73(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe
> (a) that there are grounds which would justify his detention under section 8; and
> (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

Section 8(1) of the ISA provides:

> Power to order detention or restriction of persons
>
> 8 (1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.

In the present case, upon examining the affidavits, I find that there was no strict compliance. The arresting officers purported to act under s 73(1), but the affidavits were vague in nature and do not sufficiently show that there has been due compliance with the requirements of s 73(1) of the ISA read with section 8 of the same Act.

Paragraphs 4 and 5 of the arresting officer's affidavit merely states:

> 4 Saya dengan sesungguhnya menyatakan daripada maklumat yang diterima berhubung dengan kegiatan pemohon-pemohon/orang tahanan bernama ABDUL GHANI HAROON (selepas ini disebut sebagai 'pemohon'), saya mempunyai sebab-sebab untuk mempercayai bahawa terdapat alasan-alasan yang boleh mewajarkan pemohon ditahan di bawah s 8 Akta Keselamatan Dalam Negeri 1960 (Akta 82).
>
> 5 Saya juga sesungguhnya mempercaya bahawa pemohon telah bertindak dengan cara yang boleh memudaratkan keselamatan negara.

(Similarly worded paragraphs are contained in the affidavit of the arresting officer in the case of En Gobalakrishnan.)

In my judgment, the above averments are inadequate. The affidavit of the arresting officer must state:

(a) whether he has reason to believe that the detention of the detainee was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia or any part thereof; or

(b) whether he has reason to believe that the detention of the detainee was necessary with a view to preventing him from acting in a manner

prejudicial to the maintenance of essential services in Malaysia or any part thereof; or

(c) whether he has reason to believe that the detention of the detainee was necessary with a view to preventing him from acting in a manner prejudicial to the economic life of Malaysia or any part thereof.

The grounds need not be singular but could be multiple, for example, it could be a combination of grounds (a) and (b); or even a combination of grounds (a), (b) and (c). Be it singular or multiple, the grounds must be clearly stated in the affidavit. The arresting officer in his affidavit cannot simply parrot the wordings of the provision of s 73(1)(a) of the ISA, as was done in the present case. He must show in his affidavit that he has directed his mind to the requirements of s 8 of the same Act.

In addition, since there is the word 'and' and not 'or' at the end of limb (a) of sub-s (1) of s 73, therefore, limb (b) of sub-s (1) of s 73 must be read conjunctively with limb (a), and not disjunctively. In other words, the affidavit of the arresting officer must further state:

(a) whether he has reason to believe that the detainee *has acted or is about to act or is likely to act* in a manner prejudicial to the security of Malaysia or any part thereof; or

(b) whether he has reason to believe that the detainee *has acted or is about to act or is likely to act* in a manner prejudicial to the maintenance of essential services in Malaysia or any part thereof; or

(c) whether the he has reason to believe that the detainee *has acted or is about to act or is likely to act* in a manner prejudicial to the economic life of Malaysia or any part thereof. (Emphasis added.)

Likewise, these additional grounds can be multiple in nature, for example it could be a combination of say, (a) and (c).

As to compliance with limb (b) of sub-s (1) of s 73 of the ISA, the affidavit must provide sufficient particulars. For example, if it is a case of (a) (that the arresting officer has reason to believe that the applicant has acted or is about to act or is likely to act in a manner prejudicial to the security of Malaysia), then the affidavit must state in what manner the applicant has acted or is about to act or is likely to act in a manner prejudicial to the security of Malaysia. The court is not interested in detailed information (least of all confidential or secret information), nor is the court, at this initial stage, interested in whatever evidence the arresting officer has; but the court has to know the basic particulars of what the applicant is alleged to have done, and considering that the phrase 'prejudicial to the security of Malaysia' is too general or vague in nature (so too are the phrases 'prejudicial to the maintenance of essential services of Malaysia' and 'prejudicial to the economic life of Malaysia'), the arresting officer must, in his affidavit, furnish, not necessarily detailed particulars, but *some* reasonable particulars not only for the purpose of satisfying the court that he has some basis for the arrest, but also to be fair to the detainee – to enable

the detainee, who believes that he is innocent, to defend himself. (Emphasis added.)

Encik Abdul Wahab, the learned Senior Federal Counsel, submitted that the grounds and particulars cannot be disclosed by reason of s 16 of the ISA, citing *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293. *Theresa Lim* can be distinguished because what was required there to be disclosed by the applicant was evidence or information relating to the arrest, whereas in our case, the court, as I have said earlier, is not interested in evidence or information but in the basic particulars. Further, in *Theresa Lim* the arresting officer in his affidavit stated that they are not prepared to disclose the information or evidence to the court by reason of national interest and by pleading s 16 of the ISA. But in our case no such privilege was claimed in the affidavit of the arresting officer. On the contrary, the arresting officer, in para 7 of his affidavit, claimed to have informed the detainee of his grounds of arrest. Moreover, in *Theresa Lim*, the Supreme Court did not embark on a detailed analysis as to the procedural requirements of the empowering provisions, namely, ss 73(1) and 8 of the ISA.

Non-compliance with art 5(3) of the Constitution

My second ground is that the affidavits of the arresting officers do not sufficiently show that there has been compliance with art 5(3) of the Constitution, that is, the requirement that they must inform the applicants of the grounds of arrest. Nowhere in the ISA are the arresting officers exempted from complying with this constitutional requirement.

Article 5(3) of the Constitution states:

> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

However, the affidavit of the arresting officer merely states:

> 7 Sebaik sahaja saya menangkap pemohon, saya telah memberitahu dan menerangkan kepada pemohon dalam Bahasa Inggeris yang mudah sebab-sebab pemohon ditangkap. Saya sesungguhnya mempercaya bahawa pemohon telah memahami penerangan saya.

It is to be noted that the affidavit merely mentions 'sebab-sebab' but does not go on to elaborate as to what the grounds (sebab-sebab) were. The affidavit must disclose the grounds. The need to disclose the grounds becomes all the more imperative if one were to consider the fact that the arresting officer in paras 4 and 5 of his affidavit had failed to satisfy the court that the arrest was in accordance with s 73(1) read with s 8 of the ISA. In the circumstances, I am impelled to hold that there were no grounds told to the detainee, and such an omission was a breach of art 5(3) of the Constitution, and this breach renders the arrest and detention unlawful.

Non-compliance with paragraphs (a) and (b) of the proviso to sub-s (3) of s 73 of the ISA

My third ground is that the further detention of the applicants purportedly pursuant to s 73(3)(a) and (b) of the ISA was unlawful. Paragraphs (a) and (b) of the proviso to sub-s (3) reads:

> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
>
> (c) ...

There was no proper compliance with paras (a) and (b) of the proviso to sub-s (3) of s 73 of the ISA. I say so for two reasons. First, the affidavits of the respective authorizing officers do not say anything about the purpose of the extension of the detention. They must state the purpose of the pending inquiries and the purpose must relate to the 'reason to believe' as prescribed by s 73(1) of the ISA, read with s 8 of the same Act. I do not propose to repeat what I have said earlier in dealing with the initial arrest. Taking the affidavit of Chief Inspector Eugene Tay, for example, paras 3 and 4 of his affidavit merely states:

> 3 Pada 12 April 2001, jam 8.00 pagi, saya telah memberi kuasa penahanan ke atas pemohon-pemohon/orang tahanan bernama ABDUL GHANI BIN HAROON (KP 650124-07-5181) (selepas mi disebut sebagai 'pemohon') dilanjutkan melebihi 24 jam mulai 12 April 2001 jam 10.25 pagi, satu kuasa yang diberikan kepada saya di bawah peruntukan s 73(3)(a) Akta Keselamatan Dalam Negeri 1960 bagi tujuan meneruskan siasatan terhadap pemohon.
>
> 4 Satu salinan Borang SB Form 28A (Revised) yang memberi kuasa untuk penahanan lanjutan ke atas pemohon di bawah peruntukan s 73(3)(a) Akta Keselamatan Dalam Negeri 1960 yang telah disahkan oleh Superintenden Polis SHAMSUDDIN B HJ ARSHAD, Nombor Polis G/5199, seorang Pegawai Kanan Polis yang memegang jawatan sebagai Pegawai Turus E6B di Cawangan Khas, Ibu Pejabat Polis Di Raja Malaysia, Bukit Aman, Kuala Lumpur yang mempunyai di dalam jagaannya dokumen tersebut, dilampirkan sebagai eksh 'ETI'.

Form 28A mentioned in the above para 4 reads:

> INTERNAL SECURITY ACT 1960 (REVISED 1972)
> AUTHORIZATION OF DETENTION UNDER
> s 73(3)(a) OF THE INTERNAL SECURITY ACT
> 1960 (REVISED 1972)
>
> WHEREAS I, EUGENE TAY (I/9726) CHIEF INSPECTOR of Police, of Police Headquarters KUCHING, SARAWAK am satisfied with regard to the case of ABDUL GHANI BIN HAROON NRIC No 650124-07-5181 who was arrested under s 73(1) of the Internal Security Act 1960 on 11 April 2001–1025 hours in KUCHING INTERNATIONAL AIRPORT, KUCHING that the necessary inquiries cannot be completed within the period of 24 hours, now therefore, in exercise of the powers vested in me by

s 73(a) of the Internal Security Act 1960, I hereby authorize the further detention of the abovenamed ABDUL GHANI BIN HAROON for an additional period of 24 hours with effect from 12 APRIL 2001–1025 hours.

Signature
(EUGENE TAY)
CHIEF INSPECTOR OF POLICE

Time: 0800 hours
Date: 12 APRIL 2001

Now, first and foremost, the above form is not a statutorily prescribed form and the affidavit does not say that the form is prescribed by the police department. Be that as it may, it will be observed that the form merely states that ' ... the necessary enquiries cannot be completed within the period of 24 hours'. It does not go on, as it should, to state the purpose of the inquiries.

Secondly, the affidavit fails to state the reasons for authorizing the further detention. The authorizing officer must record his reasons in the form and they must also be stated in the affidavit. These must be done not only to enable the court to evaluate the reasons for the authorization so as to rule on its reasonableness and legality, but also to ensure that the powers to authorize are not exercised mechanically but in a responsible manner. For example, ASP Cheah Kee Sam who authorized the further detention of Abdul Ghani and Gobalakrishnan for an additional period of 28 days should state in the form as well as in his affidavit his reasons as to why investigations or inquiries cannot be completed within the permissible period of 48 hours, and why a further 28 days was required. The court does not require a detailed minute-by-minute account of the detention, but some plausible explanation must be given. It is, however, true that s 73(3) of the ISA empowers the police to detain the applicant up to a period of 60 days, but this period of 60 days is the maximum period permissible; the police do not have the absolute power to detain a person for 60 days. If, for the purpose of the inquiry, the police needs to detain the person for, say, only 20 days, the police can only detain the person for 20 days. It would then be unlawful for the police to detain the person for 60 days. And at the end of the 20 day period, one of the following must be done, depending on the circumstances of the case:

(a) the person detained is set free; or

(b) the person detained is charged in court for a specific offence; or

(c) the person detained is further detained by an order of the minister made pursuant to s 8 of the ISA.

I must add that, in my view, the power to authorize further detention under paras (a), (b) and (c) of the proviso to sub-s (3) of s 73 of the ISA must be exercised reasonably and fairly, and is reviewable by the court in a habeas corpus proceeding.

To my mind, the purpose of paras (a), (b) and (c) of the proviso to s 73(3) of the ISA is to provide built-in departmental safeguards against possible abuse of the powers of arrest and detention under the ISA. In order

to achieve this purpose, the officers concerned must be objective, independent minded and professional in their approach. Although the personnel authorizing the further detention are police officers, nevertheless, their role is somewhat quite similar to that of a magistrate exercising powers of remand under s 117 of the Criminal Procedure Code. They must make their own judgments without fear or favour. In other words, the discretion is solely theirs and their superiors cannot direct or influence them in deciding whether or not to authorize the further detention. But the court must and, indeed, has the power to evaluate the exercise of the discretion.

Decision to further detain under para (c) of the proviso made prematurely

My fourth ground is that the detention is mala fide by reason of the fact that the Inspector General and the Director of the Special Branch had prematurely made up their minds to detain the two applicants for up to a period in excess of the permissible period of 30 days (paras (a) and (b) authorization). This is clearly shown by the joint letters of the Inspector General and Director of the Special Branch (signed on their behalf by one DSP Philip) of 20 April 2001 (exh PS–2 of encl 5) which states:

> Siasatan ke atasnya masih diteruskan di bawah s 73(3)(a), (b) *dan (c)* Akta Keselamatan Dalam Negeri (AKDN) 1960. (Emphasis added).

As the letter was dated 20 April, therefore at the time the letter was written, En Ghani has been detained for about nine days, meaning that the detention was then at the early stage of the 'para (b)' detention (which authorized a further detention of 28 days). But the letter, as can be seen, also mentioned a para (c) detention which meant that the responden and the Director of the Special Branch had already made up their minds to detain the applicants well beyond the para (b) stage notwithstanding the fact that detaining a person beyond the para (b) stage cannot be done automatically but must be in compliance with the requirements of para (c) which states:

> (c) he shall not be detained for more than 30 days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister.

The letter thus revealed that the Inspector General and the Director of the Special Branch have ignored the procedural safeguards as provided by para (c) of the proviso to sub-s (3) of s 73 of the ISA.

Denial of access to family members

My fifth ground is that the detention was mala fide by reason of deliberate and unreasonable denial of access to family members. Since the days of arrest (10 and 11 April 2001) and until the last day of the hearing (Tuesday, 22 May 2001), the families have been denied access by the police despite the fact that a formal request had been made to the Inspector General by the families through their solicitors.

The joint letter of the Inspector General and the Director of Special Branch states:

> Sebarang lawatan sama ada dari keluarga mahu pun daripada peguam daripada firma tuan akan menjejaskan proses penyiasatan polis yang kini sedang dijalankan.

From the day of arrest right up to the last day of hearing, all in all about 40 days have passed, and the family solicitors were still awaiting a reply from the Inspector General. In my view, to deny the applicants and their families access to one another for such a long period is cruel, inhuman and oppressive, not only to the applicants, but to their families as well.

The reply by the police department to the family solicitors that visits by family members cannot be allowed for the time being because that would impede police investigations that were in progress, is unacceptable. The request was not for a visit *immediately* after arrest. What harm could a brief visit by immediate family members do to the police investigations? The visit can be closely monitored so as to be under the watchful eyes of police officers. The law, especially a law that affects fundamental rights, should not be enforced blindly. It must be interpreted and carried out as humanely as possible. En Abdul Rashid Sudin, the learned senior federal counsel, submitted that the police have the right to deny access as long as investigations are in progress. With respect, this court does not understand that sort of reasoning. There is no provision under the ISA that confers upon the police such drastic powers. Whatever the allegations against the two applicants might be, I fail to see any justification whatsoever for denying family visits for so long. (Emphasis added.)

Denial of access to lawyers

My final ground is that the detention is mala fide by reason of deliberately and unreasonably denying access to lawyers by the respondent. Since the day of arrest, the lawyers engaged by the families, have been denied access. Such a denial is not only cruel, inhuman and oppressive, it is also a blatant violation of the applicants' constitutional rights under art 5(3) of the Constitution which stipulates:

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

In *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198, Suffian LP said:

> With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right o the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.

With respect I agree with the view of Bhide J in *Sunday Singh v Emperor* AIR 1930 Lahore 945 who said at p 947:

> 'The right of a prisoner to have access to legal advice must of course be subject to such legitimate restrictions as may be necessary in the interests of justice in order to prevent any undue interference with the course of investigation. For instance a legal adviser cannot claim to have interviews with a prisoner at any time he chooses. Similarly, although ordinarily a member of the Bar may be presumed to understand his responsibility in the matter, if there are any good reasons to believe that a particular pleader has abused or is likely to abuse the privilege, that pleader may be refused an interview. But in such cases the police must of course be prepared to support their action on substantial grounds.'

In *Hashim bin Saud v Yahaya bin Hashim & Anor* [1977] 2 MLJ 116, Raja Azian Shah FJ (as His Highness then was) said (at p 118):

> As in Canada we have a Bill of Rights. However, the position in this country seems to be that the pre-trial right of an arrested person to be allowed to consult a lawyer is merely one particular manifestation of the general right to be allowed to consult and be defended by a legal practitioner of his choice. (Art 5(3) of the Constitution). Such right starts right from the day of his arrest but it cannot be exercised immediately after arrest if it impedes police investigation or the administration of justice: see *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198. The position seems to be the same in India: see *Moti Bai v The State* AIR 1954 Raj 241. We therefore did not agree with the proposition of law propounded by the learned judge that the right to counsel could only be exercised after the completion of the period of police investigation under s 117 CPC. That is too narrow a proposition. In our view it is at the police station that the real trial begins and a court which limits the concept of fairness to the period of police investigation is completed recognizes only the form of criminal justiciable process and ignores its substance.

At a later part of the judgment, the learned judge ruled on the burden of proof in the following terms:

> … The onus of proving to the satisfaction of the court that giving effect to the right to counsel would impede police investigation or the administration of justice falls on the police.

In the present case, it is to be observed that the lawyers engaged by the families were not seeking access immediately after the arrest. The letter of Tetuan Selvam Shanmugam & Partners was dated 17 April 2001 and the reply by the police department was dated 20 April 2001. Paragraph 2 of En S Philip's letter, written on behalf of the respondent and the Director of the Special Branch to the solicitors engaged by the families of the applicants reads:

> 2 Adalah dimaklumkan bahawa penama di atas telah ditangkap di bawah s 73(1) Akta Keselamatan Dalam Negeri (AKDN) 1960 pada 11 April 2001 kerana mempunyai sebab-sebab untuk mempercayai dia telah bertindak dengan apa-apa cara yang mendatangkan mudarat kepada keselamatan Malaysia dan juga ada alasan-alasan untuk menjustifikasikan penahanannya. Siasatan ke atasnya masih diteruskan di

bawah s 73(3)(a), (b), (c) Akta Keselamatan Dalam Negeri (AKDN) 1960. Oleh yang demikian, adalah tidak wajar untuk pihak keluarga dan peguam melawat orang tahanan pada peringkat ini. Sebarang lawatan, sama ada dari keluarga mahupun daripada peguam daripada firma tuan akan menjejaskan proses penyiasatan polis yang kini sedang dijalankan. Pihak kami akan memberitahu sebaik sahaja selesai penyiasatan terhadap beliau.

The denial of access to lawyers was not only a gross violation of the fundamental rights as enshrined in the Constitution, but has also greatly prejudiced the applicants in the present application. For example, consider this aspect. The arresting officers in their respective affidavits have averred that they have informed the applicants of the grounds of arrest as soon as was possible after the arrest. In other words, the claim is made that they have complied with the first limb of art 5(3) of the Constitution. How is this court to verify these claims? This court can only make a fair judgment after having had the benefit of not only scrutinizing the affidavits of the respondent, but also the affidavits of the applicants as well. It is elementary justice that the court has to hear both sides. But then there are no affidavits deposed by the applicants, and this is due to no fault of theirs. There are no affidavits filed by them simply because right until the last day of hearing, a period of about 40 days, the lawyers and family members have been denied access to them. Thus, the denial of access to lawyers has led to injustice. En Rashid Sudin has submitted that the denial of the right to counsel is permissible as long as the investigations are ongoing. With respect, whatever the allegations against them might be, it is clearly unlawful to deny them of the constitutional guarantee for such a long period. Those police officers responsible for the detention of the applicants must wake up to the fact that the supreme law of this country is the Constitution and not the ISA.

The above is just one aspect of the matter. Now, if the applicants truly believe that they have done no wrong at all, and that from their standpoint they have been framed or persecuted, how are they to present their case in the best possible manner if they are not allowed access to counsel? This denial to counsel is not only unjust: it also makes a mockery of the right to apply for habeas corpus as guaranteed by art 5(2) of the Constitution.

The reasons given in the reply for the denial were that police investigations under s 73(3)(a), (b) and (c) of the ISA were still in progress, and that any visits by family members or lawyers would impede police investigations. Although the reply by the police department stated that the solicitors would be informed in due course after police investigations were completed, yet the lawyers have yet to receive a reply from the respondent right until the last day of the hearing.

The letter of the respondent of 20 April, as I have just read out, is most unsatisfactory. Why was there a need for police investigations to be completed first before access to lawyers could be accorded? There was no such requirement either in the ISA or the Constitution that access to lawyers would be given only after investigations are completed. The police should heed the dicta of Raja Azlan Shah FJ (as His Highness then was) in *Hashim bin Saud* to the effect (at p 118):

A In our view it is at the police station that the real trial begins and a court which limits the concept of fairness to the period of police investigation is completed recognizes only the form of criminal justiciable process and ignores its substance.

By reason of the above grounds, in particular the last two grounds, with the greatest respect and in all humility, perhaps it is high time for Parliament to consider whether the ISA, which was originally meant to counter Communist terrorism in the early years of our independence, is really relevant to the present day situations of this nation of ours; or, if at all it is to be retained, at least whether its provisions need to be thoroughly reviewed to prevent or minimize the abuses which I have highlighted in this judgment.

By reason of the above six grounds, the application of the applicants is allowed. I therefore, in accordance with art 5(2) of the Constitution, order that the applicants be produced before this court at 3.30pm today to be released.

Detention unlawful. Applicants released.

Reported by Andrew Christopher Simon